No. 97.
Sup. Ct. Brf. of Green v. Honore for

Office Supreme Court U. S.
FILED
NOV 17 1900
JAMES H. McKENNEY
Clerk

Filed Nov. 17, 1900.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

No. 97.

MICHAEL F. DOOLEY, as Receiver, etc.,
Plaintiff in Error,
vs.
JAMES PEASE,
Defendant in Error.

Error to Circuit Court of Appeals, Seventh Circuit.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

(Filed by leave of Court.)

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IN THE

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I.

A GENERAL FINDING OF NOT GUILTY CONCLUDES ALL QUESTIONS AFFECTING THE CORRECTNESS OF THE DECISION OF THE LOWER COURT EXCEPT RULINGS UPON EVIDENCE.

It has been held over and over again that this court will not review mixed questions of law and fact.

Norris v. *Jackson*, 9 Wall., 125.
Dennistoun v. *Stewart*, 18 How., 565.
Jewell v. *Knight*, 123 U. S., 426.
Smith v. *Kraft*, 123 U. S., 436.
Fire Ins. Co. v. *Wickham*, 128 U. S., 426.

It has also been held so often in this court that a general finding is conclusive (except as to rulings of evidence) that a citation of authorities would be superfluous.

The statute fixing the duty of the court under a case submitted without a jury provides:

"The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

R. S. U. S., § 649.

It is submitted that the word "or" between the word "general" and the word "special" makes it necessary that the lower court, if it chooses to make a general finding, refrain from making special findings. It cannot make both.

The result of making both general and special findings is to impose upon the Supreme Court the duty of re-examining the facts set out in the *special* findings to see whether the court was erroneous in its *general* mixed finding of law and fact, which is included in the general finding of not guilty.

It is therefore submitted that where there is a general finding, it is improper to have special findings, and they should be disregarded, leaving the general finding conclusive as to all questions except questions affecting the admission of evidence.

This point appears to have been decided in *British Queen Mining Company* v. *Baker Co.*, 139 U. S., 222.

II.

THE FINDINGS BELOW ARE CONCLUSIVE THAT CHAFFEE DID NOT HAVE THE POWER TO MAKE THIS BILL OF SALE.

The findings in this regard are as follows:

"Chaffee (the president of the company) was not vested with authority to make this transfer by the charter of the company, nor by the by-laws, nor by any action of the board of directors, nor was his act ever ratified by the board of directors, or by the company, in any manner. He had never had authority vested in him at any time by the company to make this transfer or to make similar transfers. He had never made a transfer similar to this prior to starting on his trip, beginning April 22d, 1895, on which trip he purported to make the transfer in controversy.

"The bank knew and Dooley knew that this act was an attempted preference on Chaffee's part in contemplation of the insolvency and liquidation of the company.

"Chaffee had never during the business career of the company done any act in behalf of the company that would lead the bank or anyone else to suppose that he had been given the power by the company to dispose of its assets, by way of preference, in case of impending dissolution." (Rec., p. 15.)

The plaintiff in error, however, seems to claim that there is a peremptory conclusion of law which must override the foregoing findings and by reason of which it must be held that the company ratified Chaffee's act because they refused to take any action in regard to ratifying it.

The findings in this respect are:

"The directors of the Silk Company, on being told by Lucas, who was Dooley's attorney, that it was essential that they should ratify Chaffee's act in making the supposed transfer, refused to do so and took no action whatever in regard thereto. (Rec. p. 15, Par. 20.)"

"After the appointment of said Hayden as receiver and on or about the 29th day of April, 1895, said Chaffee met in the office of said Natchaug Silk Company at Willimantic, with all the directors of said corporation who were then living and were within the State of Connecticut, being three in number besides himself, the entire board of directors consisting of six members, of whom one, to-wit, Risley, was dead, and another was absent from the state. At said meeting said plaintiff and said Lucas were also present and said Chaffee reported to said directors present at said meeting the making of said bill of sale of said good in Chicago to the plaintiff above mentioned, and requested them to ratify the same, but said directors declined to take any action whatever in regard thereto, and neither expressed an approval nor disapproval of the act of said Chaffee in making said bill of sale." (Rec. p. 16; Par. 32.)

Plaintiff in error, in support of his proposition that there must be held to be a ratification because there was no positive dissent, cites numerous cases. But these cases have no application to the case at bar, for the reason that upon examination it will be found that in each of such cases the corporation in question, through its directors, knew that an act had been done in its name, and knowing this it either retained the benefit of the act or estopped itself from denying that it had ratified the act by sitting by, day by day, and seeing the other party to the arrangement constantly changing his position to his detriment, by reason of their failure to notify him that they did not consider the contract binding.

None of these cases have any application to the case at bar, because in our case the transaction was a pure gift or gratuity, which Chaffee purported to confer upon Dooley, receiver. At no time after the making of such transfer could Dooley have been any worse off by reason thereof than he would have been if the company had

never purported to act at all and to give him this gratuitous preference.

If, however, it should be thought that the failure to dissent within a reasonable time constited a ratification, then the finding that there was no ratification must be taken to be a finding that the reasonable time within which such dissent should have been expressed had not yet elapsed.

The date of the bill of sale was April 25th, and the date of the attachments was May 20th.

III.

THE BILL OF SALE WAS VOID BECAUSE THE GRANTOR REMAINED IN POSSESSION.

There has been a conflict of opinion in various jurisdictions as to whether a sale or transfer of goods, where the vendor remained in possession, was fraudulent *per se*, or whether such remaining in possession was merely an evidentiary fact, which, together with other facts, might assist in the determination as to whether the transfer was fraudulent or not.

In the State of Illinois the law has always been settled that a sale or transfer of chattels where the vendor remained in possession was fraudulent *per se*, and this is entirely irrespective of the question as to whether there was *in fact* any fraudulent intention between the parties or not. Such a transaction is absolutely void as to creditors, no matter how proper may have been the intentions of the parties participating therein.

This principle was decided in the early case of *Thornton* v. *Davenport*, 1 Scam., 296.

The last-named case, however, involved a transaction which was in effect a chattel mortgage, and the deed itself provided that the grantor should remain in possession for a certain length of time. The court, therefore, after declaring the law to be that a bill of sale without a transfer of possession from the vendor to the vendee was absolutely void, placed a limitation upon its decision, to the effect that if the retaining of possession was provided for by the deed itself, then the transaction was not fraudulent.

This of course was an illogical limitation upon the general rule, as was pointed out by the dissenting judge in that case, who contended that the fraud upon the public was just as great, whether the deed, which was a secret instrument betweent the parties, provided that the grantor might remain in possession or not, the public relying upon the outward appearance and being deceived by the fact that the vendor still retained possession.

This case was decided in December, 1836, but was not publicly reported until 1841. Three years later, the legislature of the state, recognizing that under the decision of the majority of the court in *Thornton* v. *Davenport*, a chattel mortgage might be made providing for retention of possession by the grantor which would be secret as far as the public was concerned, enacted a statute providing—

"That no mortgage on personal property hereafter executed shall be valid as against the rights and interests of any third person, unless possession of such personal property shall be delivered to and remain with the mortgagee or said mortgage be acknowledged and recorded, etc."

Laws of Ill., 1844–45, p. 44

Thus, ever since the passage of this statute, it has been the law in Illinois, both as to absolute bills of sale and as to chattel mortgages (unrecorded), that the failure of the grantor to turn over possession to the grantee rendered the deed absolutely void.

Dexter v. *Parkins*, 22 Ill., 143.
Reese v. *Mitchel*, 41 Ill., 365.
Mumford v. *Canty*, 50 Ill., 370.
Lemen v. *Robinson*, 59 Ill., 115.
Allen v. *Carr*, 85 Ill., 388.
Rozier v. *Williams*, 92 Ill., 187.
Bass v. *Pease*, 79 Ill. App., 308, at p. 313.

As to the Federal Courts.

The case of *Warner* v. *Norton*, 20 How., 448, was a case originally begun in the United States Circuit Court for the Northern District of Illinois, and was a case exactly like the one at bar. In that case the judge in the lower court took the view opposing that then held as the law in Illinois, and charged the jury that a sale where the vendor remained in possession was not fraudulent *per se*, but that the failure of the vendor to transfer the possession was merely evidence of fraud, and this decision was affirmed by the Supreme Court of the United States, this court deciding that the best authorities seemed to hold that the failure to transfer the possession should not make the transaction absolutely void, but that it was merely evidence of fraud. The cout did not discuss the question as to whether the law of Illinois should necessarily be adopted by the United States Court in cases coming from Illinois.

But the court proceeded to discuss the conflicting rules,

and decided in favor of the rule which it adopted in that case, independently of what the Illinois law might be on the subject. And, although the case of *Thornton* v. *Davenport* was cited by counsel, the court in its decision did not mention or refer to the case.

Since the case of *Warner* v. *Norton*, however, the the Supreme Court of the United States has expressly held that the Federal tribunals should adopt the law of the state in which the property is found when they are deciding questions based upon the rules of such state affecting the transfer of property within its limits, and in the case of *Green* v. *Van Buskirk*, 7 Wall., 139, which was substantially the same as the case at bar, the court held that the question as to whether the attaching creditors did or did not have the right to seize the goods depended upon the laws of Illinois affecting the transfer of property, and distinctly further held that the law of Illinois was that a sale of personal property, the vendor remaining in possession, was absolutely void. The same principle was announced in *Hervey* v. *Rhode Island Locomotive Works*, 93 U. S., 664.

In *Green* v. *Van Buskirk* it was announced that the courts of New York must respect the attachment proceeding in Illinois, based upon the Illinois law, affecting sales of personal property, and in *Hervey* v. *Rhode Island Locomotive Works* the court held that attachment proceedings in Illinois, based upon the principle contended for here, must be respected by *the Federal tribunals.*

The court said, at page 673:

"These proceedings were valid in the first decision, where they take place, and must be respected by the Federal tribunal."

It only remains then to consider the meaning of the

words "The grantor remaining in possession," and this question need not delay us long, for it has been held in *Martin* v. *Duncan*, 156 Ill., 274, at page 280, and in *Second Nat'l. Bank* v. *Gilbert*, 174 Ill., 485, at page 491, that the grantor must be held to have remained in possession, unless he has *openly and notoriously* surrendered his possession to the grantee in a manner which will inform third persons that he has so surrendered his possession.

In *Martin* v. *Duncan*, *supra*, the court said:

"Up to May 16th the defendant in error had been in possession, as agent of his brother, and if, on May 28th, he was in possession for himself, the change in the character of the possession should have been indicated by such outward, open, actual and visible signs as could be seen and known to the public or persons dealing with the goods. * * * When the known and previously recognized agent of an alleged vendor remains in possession, the appearance to the world is the same as though the vendor himself remained in possession, unless there are substantial and visible signs of a change of title."

In *Second Nat'l Bank* v. *Gilbert*, *supra*, the court said:

"When the known and previously recognized agent of an alleged vendor remains in possession of personal property the appearance to the world is the same as though the vendor himself remained in possession, unless there are substantial and visible signs of a change of title. The change in the character of the possession should be indicated by such outward, open, actual and visible signs as can be seen and known to the public or persons dealing with the property (citing cases)."

This, then, being the law of Illinois, let us consider the findings in our case:

"Said store had for several years prior thereto [the execution of the bill of sale] been operated by said Natchaug Silk Company as a store for the sale to dealers

of its manufactured goods through one H. L. Stanton, who, down to said April 25, 1895, had acted as its agent for that purpose." (Rec. p. 13; Par. 11.)

"On the morning of April 26th, 1895, an attorney employed by the said plaintiff (Dooley) called at said store, purported to take possession of said goods in the name of the plaintiff, employed said Stanton as agent of the plaintiff to sell said goods." (Rec. p. 14; Par. 12.)

"There was no change in the title to or possession of said goods which was visible, open or notorious, down to the date of the attachments." (Rec. p. 15; Par. 14.)

"There was nothing in the appearance outside or inside to indicate that there had been any change in the title or possession to the goods on or after April 25th and until May 20th, the time of the attachment." (Rec. p. 15; Par. 23.)

"The same persons (being five or six in number) remained in the store performing, after the transfer to Dooley, apparently the same duties they had been performing prior to April 25th."

"The salesmen were instructed not to inform the public nor customers of the transfer to Dooley, and they did not do so." (Rec. p. 15; Par. 24, 25.)

"The signs of the Natchaug Silk Company on the outside and inside of the store were not changed between April 24th and the time of the levy of the attachment." (Rec. p. 15; Par. 22.)

"No advertisement was made of the transfer to Dooley nor was any public notice given thereof. There was nothing to inform the public that any change had taken place in the ownership or possession of the goods between April 24, 1895, and the levy of the attachments on May 20, 1895. The change of ownership was not open or visible or notorious." (Rec. p. 16.)

Thus we have a clear case of a bill of sale (or a chattel mortgage, if the court chooses to so construe it) where the grantor, according to the law of Illinois, still remained in possession, and hence the bill of sale (or chattel mortgage) is void.

We may say in this connection that we do not rely in

this case upon either of the statutes cited in the brief for plaintiff in error, at page 31 and at page 34, nor indeed do we rely upon any statute (unless it be the statute in relation to chattel mortgages) for under the rule laid down in *Thornton* v. *Davenport* (*supra*), which is therein declared to be the *common law*, supplemented by the chattel mortgage act, it is the law of Illinois that no transfer of chattels, whether by bill of sale or chattel mortgage, is valid unless the grantor delivers possession to the grantee.

The statutes cited by the plaintiff in error in his brief above alluded to, if they afford remedies to creditors, are merely cumulative to the remedies which, as we have pointed out, are afforded by the rule in *Thornton* v. *Davenport*, and by chattel mortgage act of Illinois.

IV.

THE DOCUMENT ALTHOUGH ON ITS FACE A BILL OF SALE WAS INTENDED TO BE A CHATTEL MORTGAGE AND HENCE IS VOID.

The courts of Illinois will look at the circumstances attending the execution of an apparent bill of sale and will determine whether it was in fact an absolute deed or merely a chattel mortgage.

Martin v. *Duncan*, 156 Ill,, 274.
2nd Nat'l. Bank v. *Gilbert*, 174 Ill., 485.
Hervey v. *R. I. Locomotive Works*, 93 U. S., 664.

(In the latter case a lease was construed as a chattel mortgage.)

In our case the document appears to have been in-

tended as a chattel mortgage. The findings in this regard are:

"Prior to or about the time of his appointment as such receiver, the plaintiff requested of said Chaffee, as president and general manager of said Natchaug Silk Company, that said Natchaug Silk Company should give *security* for the payment of its indebtedness to the First National Bank of Willimantic, and said plaintiff then and there told said Chaffee that unless said *security* was given, he, the plaintiff, would close said silk company up.

"Immediately thereafter, said Chaffee came to the City of Chicago with one Solomon Lucas, an attorney at law, who had been employed by the plaintiff to look after the interests of the First National Bank of Willimantic, and executed in the name of said Natchaug Silk Company and delivered to said Lucas on behalf of the plaintiff a bill of sale, etc. (Rec. p. 12, par. 9, 10.) * * * At the time the said bill of sale was executed and delivered by said Chaffee to said Lucas said Chaffee directed said Lucas to have the said goods that were included in said bill of sale sold and the proceeds of such sale applied by said plaintiff as a payment upon the indebtedness. (Rec. p. 13; par. 11.) * * * No deduction from or cancellation of the debt to the bank or its receiver, Dooley, was made at the time of or by reason of the giving of said bill of sale; nor was any deduction from or cancellation of said debt made by said Dooley in his proof of claim against the receiver of said Silk Company filed April 7, 1896 [nearly one year later] on account of or by reason of the giving of this bill of sale, although he had received the sum of $7,000 out of the sale of a portion of these goods." (Rec. pp. 17–18, par. 37.)

We have here then in the findings a clear case of a document absolute in form given and intended to be merely security for an indebtedness or in effect a chattel mortgage.

This was clearly fraudulent and void and would have warranted the Circuit Court of Appeals in affirming the

judgment of the lower court, (even if the two previous points in regard to Chaffee's authority and the vendor remaining in possession were held to be not sufficient) on the ground that an absolute bill of sale intended as a mortgage is fraudulent *per se*.

Beidler v. *Crane*, 135 Ill., 92.
Watkins v. *Arms*, 64 N. H., 99.
First Nat. Bank v. *Co.*, 43 Mo. App., 561.
Campbell v. *Davis*, 85 Ala., 56.
Sims v. *Gaines*, 64 Ala., 392.
Winkley v. *Hill*, 9 N. H., 31.
Halcome v. *Ray*, 1 Ired., 340.
Friedley v. *Hamilton*, 17 S. & R., 70.

Respectfully submitted.

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